

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Administrative
Penalty Order Issued to Robert Rehm,
d/b/a Crest Auto Service, and
Matthew Schramm

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

Administrative Law Judge Kathleen D. Sheehy conducted a hearing in this matter on June 24, 2003, at the Minnesota Pollution Control Agency (MPCA), 520 Lafayette Road North, St. Paul, Minnesota 55155. There were no post-hearing submissions.

Beverly M. Conerton, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127, appeared for the MPCA.

Sharon Schramm, 35091 Star Lake Drive, Pequot Lakes, MN 56472, appeared for herself and her husband, Matthew Schramm, without counsel.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the MPCA will make a final decision in this matter after reviewing the administrative record. The Commissioner may adopt, reject or modify these Recommendations. Under Minn. Stat. § 116.072, subd. 6(e), the Commissioner may not make the final decision until this Report has been made available to the parties to the proceeding for at least five days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the office of Sheryl Corrigan, Commissioner of the MPCA, 520 Lafayette Road North, St. Paul, Minnesota 55155, to find out how to file exceptions or present argument. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUE

Should the Administrative Penalty Order, assessing nonforgivable penalties in the amount of \$2,540 against Matthew Schramm, be affirmed?

The Administrative Law Judge concludes that the \$2,540 penalty should be affirmed.

Based on all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Background Facts

1. In 1988 Sharon and Matthew Schramm purchased a former gas station at 1316 East 66th Street in Richfield, Minnesota, for the purpose of operating Crest Auto Service, a car repair business. At the time of the purchase, there were gasoline storage tanks and an underground storage tank for used motor oil on the property. Because the Schramms did not intend to operate a gas station, the purchase agreement required the previous owner to remove the gasoline storage tanks on the premises. No arrangements were made with regard to the underground tank for used motor oil, and the Schramms continued to use it for that purpose.

2. In 1989 the MPCA adopted rules, in conformance with federal requirements, providing that all existing underground storage tanks had to be upgraded using specific corrosion protection methods or removed by December 22, 1998.^[1] The rules also require that owners and operators of underground storage tanks monitor the tanks on at least a monthly basis, depending on the method used, to detect leaks.^[2] The Schramms were not aware of these rule changes.

3. In 1994 Crest Auto Service applied for a license as a hazardous waste generator from Hennepin County. During the process the Schramms completed a hazardous waste license management plan, in which they disclosed that they stored used motor oil in a 250-gallon underground tank, which was pumped out and recycled twice a year.^[3] The county inspector who completed the inspection report did not note any problems with their use of the underground tank.^[4] Crest Auto Service subsequently received a license from Hennepin County as a Very Small Quantity Hazardous Waste Generator.

4. The Schramms operated Crest Auto Service until 1995, when they leased the property to Robert Rehm, who took over the car repair business. The Schramms now operate another car repair business in Pequot Lakes.

5. In 1997 Hennepin County conducted another hazardous waste generator inspection of Crest Auto Service. At that time the inspector informed Robert Rehm that the underground storage tank had to be registered, and the inspector provided the telephone number for information about tank registration. The inspector did not fill in a "response due date" on the inspection form by which this violation had to be corrected.^[5] Neither Rehm nor the Schramms registered the tank in response to this inspection.

6. On August 30, 2002, Shirley Smith, a tank inspector for Hennepin County's Department of Environmental Services, inspected the underground storage tank at Crest Auto Service. She was not able to determine what material the tank was made of or whether it had been upgraded.^[6] Smith sent a letter of warning,^[7] to which Rehm responded by registering the tank. Ultimately Rehm and the Schramms determined that the tank was fabricated of bare steel and had no corrosion protection, and they removed it. At the time of removal, they determined that a small amount of oil had leaked from the tank. They are now in the process of cleaning up the site.

Procedural History of Administrative Penalty Order

7. On April 1, 2003, the MPCA issued an Administrative Penalty Order notifying Rehm and the Schramms that it had found three violations: owner's failure to register the tank with the MPCA, as required by Minn. Stat. § 116.48, subd. 1; failure to upgrade or properly close the tank, as required by Minn. R. 7150.0110; and failure to monitor the tank for leak detection, in violation of Minn. R. 7150.0330.^[8] It assessed a forgivable penalty in the amount of \$1,250 for failure to register the tank and a nonforgivable penalty in the amount of \$2,540 for failure to upgrade or close the tank by 1998 and failure to perform leak monitoring.

8. The Schramms took the corrective actions specified in the Administrative Penalty Order, and the \$1,250 penalty for failure to register the underground storage tank has been forgiven.^[9]

9. The Schramms, but not Robert Rehm, appealed the Administrative Penalty Order by letter dated April 29, 2003, and requested that a hearing be scheduled.

10. The MPCA issued a Notice of and Order for Hearing on June 4, 2003, setting the hearing to take place on June 24, 2003.

Calculation of the Penalty

11. The MPCA uses a matrix to determine the amount of the base penalty for a violation, in which the potential for harm and the deviation from compliance are rated as minor, moderate, or major. The penalty range is then identified by the location on the matrix.^[10] The agency typically selects the middle of the penalty range identified by the matrix, unless there is a reason to choose the top or bottom of the range.^[11]

12. For failure to upgrade or close the tank in violation of Minn. R. 7150.0110, the MPCA determined the potential for harm was minor in that the tank was small, had a low throughput, and was pumped out at least twice a year; the deviation from compliance, however, was major, in that the owner and operator had ten years to bring the tank into compliance but failed to do so. The matrix establishes a penalty range of \$500 to \$2,000. The MPCA selected a penalty of \$750, which is lower than the middle of the range, based on the factors identified above.^[12]

13. For failure to monitor the tank for leakage in violation of Minn. R. 7150.0310, the MPCA determined that the potential for harm was minor because the tank was small, had a low throughput, and was pumped out at least twice a year; the deviation from compliance was again considered to be major in that no leak detection was conducted for the tank from December 22, 1989 until the time of its removal in December 2002. The matrix establishes a penalty range of \$500 to \$2,000 for this violation; the MPCA selected a penalty of \$1,250, which is at the middle of the range, because when the tank was removed in December 2002 some contamination from leakage was found.^[13]

14. The MPCA then adjusted the base penalty for the monitoring violation by adding \$540, which it determined to be the economic benefit to the owner of failing to monitor for leakage. The cost was calculated by assuming it would take an employee one hour per month at \$15 per hour to perform monthly manual tank gauging. This benefit was calculated for a three-year period.

15. The total adjusted penalty for these two violations is \$2,540.

16. The MPCA considers violations for failure to upgrade or close an underground storage tank and failure to monitor leakage from a tank to be serious violations because noncompliance poses an actual or potential danger to the environment.^[14] As a consequence the MPCA deems these penalty amounts to be nonforgivable.

Based on the above Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Department have authority to consider and rule on the issues in this contested case hearing pursuant to Minn. Stat. § 116.072, subds. 1 & 6.

2. Minn. Stat. § 116.072, subd. 6, provides that the person subject to an administrative penalty order may request an expedited hearing. In such cases the commissioner must notify the person to whom the penalty order is directed of the time and place of the hearing at least 20 days before the hearing, and the expedited hearing must be held within 30 days after a request for hearing has been filed unless the parties agree to a later date. It appears that the MPCA gave slightly less than 20 days notice of the hearing, and the hearing was not held within 30 days of the request; however, no party objected to the notice or hearing date, and the Administrative Law Judge accordingly concludes that these procedural defects are harmless and caused no prejudice.

3. As the party proposing that action be taken, the MPCA has the burden of proving the facts at issue by a preponderance of the evidence.^[15]

4. Minn. R. 7150.0110, subp. 1, provides that not later than December 22, 1998, all existing underground storage tank systems must comply with one of the following requirements: new performance standards, upgrading requirements, or closure requirements. The underground storage tank at Crest Auto Service did not comply with these requirements at the time of the inspection in August 2002.

5. Minn. R. 7150.0310 provides that owners and operators of petroleum underground storage tank systems must provide release detection for tanks by an approved method at least every 30 days. Matthew Schramm is an owner of a petroleum underground storage tank system, and he failed to provide release detection by any method from the time he purchased the property until the tank was removed in December 2002.

6. Minn. Stat. § 116.072, subd. 2, allows the commissioner of the MPCA to issue an order assessing a penalty up to \$10,000 for all violations identified during an inspection. In determining the amount of the penalty, the commissioner may consider the willfulness of the violation, the gravity of the violation, including damage to water, land, or other natural resources of the state, the history of past violations, the number of violations, the economic benefit gained by the person by allowing or committing the violation, and other factors as justice may require. For repeated or serious violations, the commissioner may issue an order with a penalty that will not be forgiven.^[16]

7. The MPCA followed its procedures for calculating the base and adjusted penalties in the amount of \$2,540 for these violations.

8. The MPCA properly considered the factors contained in Minn. Stat. § 116.072, subd. 2, in calculating the amount of the penalty.

9. The MPCA reasonably determined that the failure to upgrade or close the underground storage tank and failure to monitor the tank for leakage are serious violations. Serious violations are not forgivable pursuant to Minn. Stat. § 116.072, subd. 5(b).

Based on the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATION

That the Administrative Penalty Order imposing a nonforgivable fine of \$2,540 against Matthew Schramm be AFFIRMED in all respects.

Dated: July 9, 2003

/s/ Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

Reported: Tape recorded (three tapes)

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the commissioner is required to serve the final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

The Schramms do not dispute that the violations occurred but maintain the penalties are not reasonable because they complied with the requirements as soon as they learned about them. The Schramms are in the auto repair business and have been for many years; they are charged with conducting the business in conformance with the rules. Furthermore, the MPCA has made substantial efforts to inform the public about these requirements through the “Generator News” newsletter it publishes and sends to generators of hazardous waste.^[17]

The owners also maintain essentially that they relied to their detriment on the inspector who conducted the Hennepin County hazardous waste generator inspection in 1994, who did not mention these requirements. Hennepin County conducted this inspection pursuant to its own hazardous waste ordinance; it has no rules concerning underground storage tanks and was not responsible for enforcement of MPCA rules.^[18] The Schramms should have known what the rules required and would have been able to learn of those requirements easily enough had they been diligent.

K.D.S.

^[1] Minn. R. 7150.0110.

^[2] Minn. R. 7150.0330.

^[3] Ex. 8.

^[4] *Id.*

^[5] Ex. 2.

^[6] Ex. 3.

^[7] Ex. 7.

^[8] Ex.

^[9] Testimony of Robert Dullinger. Minn. Stat. § 116.48 provides that an owner of an underground storage tank must notify the MPCA by June 1, 1986, or within 30 days of installation, whichever is later, of the tank's existence and specify the age, size, type, location, uses, and contents of the tank on forms prescribed by the MPCA. The Schramms did not own the property on June 1, 1986, nor did they install the tank on the property after purchasing it. It appears that the statute is properly directed to the previous

owner of the property, and that the Schramms should not be cited under the statute for failing to register the tank. As this penalty has been forgiven, however, the issue appears to be moot.

^[10] Ex. 6

^[11] Testimony of Robert Dullinger.

^[12] Ex. 4.

^[13] *Id.*

^[14] See Ex. 6; Testimony of Robert Dullinger.

^[15] Minn. R. 1400.7300, subp. 5.

^[16] Minn. Stat. § 116.072, subd. 5(b).

^[17] See, e.g., Exs. 9-13.

^[18] Hennepin County and the MPCA entered into a Joint Powers Agreement in 2000, under which the County added to its hazardous waste inspection checklist the existence and registration of underground and above ground storage tanks. See Testimony of Shirley Smith.